IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Appeal No. 2550-SB of 2006

Date of Decision: August 08, 2007

Sardara

Appellant

VERSUS

State of Haryana

Respondents

CORAM: HON'BLE MR.JUSTICE RANJIT SINGH

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

Present: Present: Mr.R.K.Malik, Advocate,
for the applicant-appellant.

Mr.S.K.Hooda, Sr. DAG, Haryana.

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RANJIT SINGH J.

Appellant-Sardara, aged about 65 years, is accused of making an attempt to commit rape on the prosecutrix stated to be aged about 13 years. He stands convicted for this offence and sentenced to suffer R.I. for five years with fine of Rs.10,000/-. He

is further to undergo R.I. for six months in case of default in payment of fine. A sum of Rs.8,000/- is to be paid to the prosecutrix in case the fine is recovered/realised from the appellant. Appellant has now filed the present appeal impugning his conviction and award of the sentence as noticed.

The case was registered on the statement made by father of the prosecutrix who alleged that on March 01, 2005, his daughter, aged about 13 years, had gone to the house of her friend Angrejo to seek return of Rs.4/- which she had lent to the later. The appellant, father of said Angrejo, allegedly took the prosecutrix inside the room on the pretext of paying the amount. It is alleged that the appellant made her sit on the bed and started lewd talk. Even the arrival of appellant's daughter and wife did not deter him in pursing his exploits. Appellant is stated to have slapped his wife and kicked his daughter and thus turned them away from the room. The allegation further is that he caught hold of the prosecutrix and made her lie on the bed and started fondling with her breasts and kissed her. Thereafter the appellant opened the string of her salwar and inserted finger into her vagina. The prosecutrix thereupon started weeping and tried to save herself. Hearing her cries, the sisters of the prosecutrix reached at the house of the appellant and thus saved her from being ravished. Sisters of the prosecutrix had pushed the appellant due to which he suffered injuries on the head. Complaint

was lodged. FIR was registered and investigation followed. Appellant as well as the prosecutrix were subjected to medical examination. The challan was filed for an offence under Section 376 IPC read with Section 511 IPC against the appellant. He was, accordingly, charged and prosecuted.

The appellant, when confronted with the circumstances and the evidence appearing on record against him, denied the allegations. In his defence, appellant stated that his daughter Angrejo had gone to fetch water from water tap installed near his house in the street. He heard the noise of some altercation and on reaching the scene found that the prosecutrix was beating and abusing his daughter Angrejo. He, as such, slapped the prosecutrix whereupon, she called her father and uncle who caused him injuries. Fearing that the appellant would make a complaint against them for causing the injuries to appellant, the present false complaint was lodged with the local police alleging attempt of rape against the appellant. The appellant has examined two witnesses in support of his defence case, one of which is his daughter. The trial Court, after analysing the evidence, found the appellant guilty of the charge and sentenced him as stated.

Mr. Malik, learned counsel for the appellant has made strenuous efforts to make me go through the entire evidence to

substantiate the fact that the appellant has been falsely implicated and in fact no incident, as alleged by father of the prosecutrix, had taken place.

Learned State counsel, however, has pleaded otherwise and has submitted that case of the prosecution would receive support from the evidence of the prosecutrix, her father and sisters and as such the conviction of the appellant, would not call for any interference.

I have gone through the entire evidence especially that of the Prosecutrix (PW-9). She has very clearly supported the entire case of the prosecution. Her version would find support from the evidence of her sister Bhaskar (PW-14), who had gone to the scene of incident after hearing cries of the prosecutrix and had rescued her from the appellant. The complainant, father of the prosecutrix who had lodged this FIR, had also appeared as a witness to support case of the prosecution. The evidence given by Dr.Neelam Kakkar (PW-11) would also lend some support to the case of the prosecution wherein she deposed that a possibility of attempted rape on the prosecutrix cannot be ruled out. The prosecutrix is aged about 13 years. The submission raised by counsel for the appellant that she has been made to lodge false complaint, does not sound logical or probable. Even if, there was some fight or differences between the families, village folk cannot be

expected to put the honour of a young daughter at stake. Father of young girl, generally would not put at stake the honour of his own daughter. Even otherwise, young girl, aged about 13 years could not be so tutored to make a false allegation. She is supported by her two sisters. Were they also made to stand up and make false allegations against the appellant ? I am not inclined to accept the submission that the appellant has been falsely implicated in this case.

Faced with this situation, counsel for the appellant submitted with some justifications that the facts, as established on record, would not prove this to be a case of attempted rape. As per the counsel, at the most, an offence under Section 354 IPC may be revealed, even if, everything is otherwise accepted. In support of his submission, he has drawn my attention to number of judgments of this Court as well as of the Hon'ble Supreme Court. The counsel has first referred to the case of **Ramkripal vs. State of Madhya Pradesh (SC), 2007 (2) RCR (Criminal) 391.** The Hon'ble Supreme Court, in this case, has noted the difference between an offence of attempted rape and outraging the modesty as provided under Section 354 IPC as under:-

> “Modesty is defined as the quality of being modest; and in relation to woman, “womanly propriety of behaviour; scrupulous chastity of thought, speech and conduct'”. It

is the reserve or sense of shame proceeding from instinctive aversion to impure or coarse suggestions. As observed by Justice ***Patterson in Rex v. James Llyod, 173 ER 141*** in order to find the accused guilty of an assault with intent to commit a rape, court must be satisfied that the accused, when he laid hold of the prosecutrix, not only desired to gratify his passions upon her person but that he intended to do so at all events, and notwithstanding any resistance on her part. The point of distinction between an offence of attempt to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he was just going to have sexual connection with her."

While explaining about an attempt to commit rape, the Hon'ble Supreme Court, in this case, said as under:-

"A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds, he has committed the offence; f he fails due to reasons beyond his control, he is said to have attempted to

commit the offence. Attempt to commit an offence can be said to begin when the preparations are complete and the culprit commences to do something with the intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence....."

"An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission or consummation/completion. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly show the legislative intention to make a difference between the

cases of a mere preparation and an attempt."

The counsel has next referred to a case of **Tarkeshwar Sahu vs. State of Bihar (SC), 2006(4) RCR (Crl), 603.** In this case again the Hon'ble Supreme Court referred to English case of ***Rex vs. James Lloyed, 173 ER 141*** referred to above to point out distinction between rape and criminal assault. Observations of Justice Patterson in the case of ***Rex*** Vs James Lloyed were highlighted in this case also. These may bear repetition here as under:-

> " In order to find the prisoner guilty of an assault with intent to commit a rape, one must be satisfied that the prisoner, when he laid hold of the prosecutrix not only desired to gratify his passions upon her person but that he intended to do so at all events and notwithstanding any resistance on her part."

Hon'ble Supreme Court in **Tarkeshwar Sahu's case** (Supra) further observed:-

> "A similar case was decided by Mirza and Broomfield JJ. Of the Bomaby High Court in Ahmed Asalt Mirkhan, Criminal Appeal No.161 of 1930, decided on 12.8.1930 reported in Law of Crimes by Ratanlal Dhirajlal page 922. In that case the complainant, a milkmaid aged 12 or 13 years, who was hawking milk, entered the accused house to deliver milk. The accused got up from the bed on which he was lying and chained the

> door from inside. He then removed his clothes and the girl's petticoat, picked her up, laid her on the bed and sat on her chest. He put his hand over her mouth to prevent her crying and placed his private part against hers. There was no penetration. The girl struggled and cried and so the accused desisted and she got up, unchained the door and went out. It was held that the accused was not guilty of attempt to commit rape but of indecent assault. The point of distinction between an offence to commit rape and to commit indecent assault is that there should be some action on the part of the accused which would show that he is just going to have sexual connection with her."

Reference has also been made to the case of **Jai Chand vs. State (Delhi), 1996(2) RCR 244.** In this case, it was observed by the Delhi High Court that in order to bring out a charge of attempt to rape, the prosecution must establish that it had gone beyond the stage of preparation. The difference between preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. This was a case where accused had forcibly laid the prosecutrix on bed, broke her string, torned her underwear and gave her tooth bite. Accused, however, made no attempt to undress himself. The prosecutrix managed to push the accused and

escaped. His act was found to attract offence under Section 354 IPC. Somewhat, similar view was taken by this Court in the case of **Subhash Chander vs. State of Haryana (Pb.& Hry.), 1983(1) RCR (Crl.) 283,** by observing that where the accused person had made preparation to commit rape but did not do so upon resistance of the prosecutrix, the case would fall under criminal assault. The Court observed as under:-

> "The conviction of an attempt to rape ought not to be arrived at unless the Court is satisfied that the conduct of the accused indicated a determination to gratify his passion at all events and in spite of all resistance as held in State of Madhya Pradesh vs. Babulal, AIR, 1950 M.P.155. In this authority the distinction between an attempt to commit rape and to commit indecent assault was drawn. It was held that for the former, there should be some action on the part of the accused which would show that he is just going to have sexual connection with the prosecutrix but for an offence of an attempt to commit rape, the prosecution must establish that it has gone beyond the stage of preparation. The difference between mere preparation and actual attempt to commit an offence consists chiefly in the greater degree of determination. Applying this test

> to the circumstances of the present case, the appellant no doubt made preparation to seduce the prosecutrix but no other action on his part has been established to show that it had gone beyond stage of preparation and that the appellant was determined to gratify his passion in spite of all resistance."

The facts established on record have been noted above. Though there are allegation that the appellant has laid the prosecutrix on bed, had opened the string of her salwar and inserted his finger in her vagina, but yet he did not remove his cloth or make any further attempt to penetrate his male organ. These facts would appear akin to the case of **Jai Chand (supra)**. To say that inserting a finger in vagina would not be covered under the offence of rape, the counsel has referred to the case of **Sakshi vs. Union of India, 2004 (3) RCR (Criminal) 702.** The Hon'ble Supreme Court has held in this case that the expression 'sexual intercourse' has not been defined in Section 375 IPC but by process of judicial interpretation hectrosexual intercourse involving penetration of vagina by penis constitute the sexual intercourse for offence of rape. As held by the Honb'le Supreme Court, this definition cannot be enlarged to include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vagina and finger/ anal penetration and object/vaginal penetration. Reference is

also made to the observations of the Law commission which is as under:-

> “9.59 Sexual-child abuse may be committed in various forms such as sexual intercourse,carnal intercourse and sexual assaults. The case involving penile penetration into vagina are covered under Section 375 of the IPC. If there is any case of penile oral penetration and penile penetration into anus, Section 377 IPC dealing with unnatural offences, i.e. carnal intercourse against the order of nature with any man, woman or animal, adequately takes care of them. If acts such as penetration of finger or any inanimate object into vagina or anus are committed against a woman or a female child, the provisions of the proposed Section 354 IPC whereunder a more severe punishment is also prescribed can be invoked and as regards the male child, the penal provisions of the IPC concerning 'hurt' 'criminal force' or 'assault' as the case may be, would be attracted. A distinction has to be naturally maintained between sexual assault/use of criminal force falling under Section 354, sexual offences falling under Section 375 and unnatural offences falling under Section 377 of the Indian Penal Code. It may not be appropriate to bring unnatural

offences punishable under Section 377 IPC or mere sexual assault or mere sexual use of criminal force which may attract Section 354 IPC within the ambit of 'rape' which is a distinct and graver offence with a definite connotation. It is needless to mention that any attempt to commit any of these offences is also punishable by virtue of Section 511 IPC. Therefore, any other or more changes regarding this law may not be necessary."

The above report of the Law Commission was given in response to a reference made to the effect if all forms of penetration would come within the ambit of Section 375 IPC. Thus it can be said that the offence of attempted rape for which the appellant is held guilty can not be sustained.

Is appellant to be acquitted altogether or he can be convicted for some cognate minor offence. Section 222 of Cr.P.C. would regulate the course and it is as under:-

" (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence,

he may be convicted of the minor offence, although he is not charged with it.

(3) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(4) Nothing in this section shall be deemed to authorise a conviction of any minor offence where the conditions requisite for the initiation of proceedings in respect of that minor offence have not been satisfied."

Precedents are in plenty and can be so referred to say that when an accused is charged with a major offence and if the ingredients of major offence are not proved, the accused can be convicted for minor offence, if ingredients of minor offence are made out or are available. Reference can be made to case of **Lakhjit Singh and another v. State of Punjab, 1994 Supp.(1) SCC 173 and Shamnsaheb M. Mulltani vs. State of Karnatka 2001 (1) RCR (Criminal) 617** in this regard. The facts as proved on record would show that the appellant is clearly seen guilty of committing an offence under Section 354 IPC. Hon'ble Supreme Court adopted such a course in the case of **Tarkeshwar Sahu (Supra).** In **Jai Chand 's case (Supra)**, Delhi High Court altered the conviction of the accused therein to an offence under Section 354 IPC where the allegations

were somewhat similar. In **Nuna vs. Emperor, 15 IC 309:13 Cr.L.J.469** the Court held as under:-

> "The accused took off a girl's clothes, threw her on the ground and then sat down beside her. He said nothing to her nor did he do anything more. It is held that the accused committed an offence under Section 354 IPC and was not guilty of an attempt to commit rape."

In **Subhash Chander's case (Supra),** Court went on to hold:-

> "So far as the finding of human semen on the clothes of the prosecutrix is concerned, it is not sufficient to prove either rape or an attempt thereof. It was held in Jalal vs. Emperor AIR 1930 Lah.193, that the report of the Chemical analyser regarding the presence of semen on the complainant's clothing is not sufficient to prove the offence of rape.
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> From what is stated above, I am not in agreement with the conviction of the appellant under Section 376 read with Section 511, Indian Penal Code. This conviction is converted into the one under Section 354, Indian Penal Code."

On the analysis of the law and evaluation of the evidence on record, the conviction of the appellant is unsustainable. The appellant however is clearly guilty of offence under Section 354 IPC and it is

accordingly so held and his conviction is altered to an offence under Section 354 IPC.

The appellant is sentenced to suffer R.I. for five years and fine of Rs.10,000/- upon his conviction for an offence of attempted rape. His conviction has now been altered to offence under Section 354 IPC. The offence under Section 354 IPC is punishable up to two years, or with fine or with both. It is stated that the appellant by now has already undergone about 2 ½ years R.I. Thus the appellant has already undergone a sentence which is more than the maximum prescribed sentence for the offence for which he is now convicted. The petitioner, as such, is required to be released and it is so directed by reducing his sentence to period of RI which is maximum provided under Section 354 IPC. The fine awarded in this case, however, would stand increased by Rs.15,000/-, out of which Rs.10,000/- will be paid to the prosecutrix, upon being realised. In default of payment of fine, the appellant would undergo sentence of nine months R.I.

(RANJIT SINGH)
JUDGE

August 08, 2007
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